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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Application by BellSouth Corporation,
BellSouth Telecommunications, Inc., and
BellSouth Long Distance, Inc., for
Provision of In-Region, InterLATA
Services in South Carolina

CC Docket No. 97-208

To: The Commission

**BELLSOUTH'S MOTION TO STRIKE PORTIONS OF REPLY COMMENTS
RAISING NEW ARGUMENTS AND/OR INCLUDING NEW EVIDENCE**

In its Public Notice establishing revised procedures for section 271 proceedings, the Commission emphasized that "[t]he applicant's and third parties' reply comments may not raise new arguments or include new data that are not directly responsive to arguments other participants have raised, nor may the replies merely repeat arguments made by that party in the application or initial comments."¹ Despite this clear admonition, in their reply comments CLECs and their trade associations have submitted new arguments and evidence that could have been presented in initial comments and do not answer any comments filed by other parties. BellSouth has been denied an opportunity to respond to these new claims in its reply filing, and the Commission accordingly has been denied the benefit of a full record. To treat all parties fairly in

¹ Revised Procedures for Bell Operating Company Applications under Section 271 of the Communications Act, Public Notice, FCC 97-330, at 7 (rel. Sep. 19, 1997) ("Revised Procedures").

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this proceeding, and to discourage similar abuses in future section 271 proceedings, the Commission should strike these improper submissions.

In its Michigan Order the Commission, prompted by CLEC motions to strike, discussed the perils that accompany submission of new evidence after initial comments have been filed.² The Commission stressed that unless the record is “fixed” prior to the filing of reply comments, “other parties have no opportunity to comment on the veracity of such information except through the submission of ex partes.” Michigan Order ¶ 52. Nor can newly raised arguments or evidence be adequately addressed through ex parte comments, which are limited to a total of twenty pages. Id.³ The Commission also pointed out that submission of new information at the reply stage impairs the ability of state commissions and the Attorney General to meet their consultative obligations under the Act, while placing an unreasonable burden on the Commission itself. Michigan Order ¶¶ 53-54.

Although articulated with applicants’ submissions in mind, these concerns apply to all reply comments. In its Michigan Order, the Commission therefore emphasized that while all participants in a section 271 proceeding may reply to comments made by other participants, reply comments may not raise new arguments that are not directly responsive. Michigan Order ¶ 51; see also Revised Procedures at 7. The Commission does not have the time or the resources “to

² See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 50 (rel. Aug. 19, 1997) (“Michigan Order”).

³ See also Comments Requested on Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in South Carolina, Public Notice, DA 97-2112, at 2 (rel. Sep. 30, 1997).

evaluate a record that is constantly evolving.” Michigan Order ¶ 54. Nor are late submissions by commenters fair to Bell company applicants, who are effectively denied their right of replying to all issues raised by their opponents.

In this proceeding CLECs and other commenters have misused reply comments to present new evidence in support of arguments they have already raised; have rewritten as replies arguments they already made as opening comments; have filed untimely initial comments as “reply” comments; and have improperly sought to incorporate into their reply comments materials that were filed in other proceedings. Accepting such new evidence and argument would jeopardize the basic fairness of this and future section 271 proceedings.

1. New Evidence

Various CLECs have offered in their replies non-responsive evidence that was available prior to the filing of initial comments on October 20, 1997. This new evidence has been withheld until BellSouth has no chance to respond, and is thereby “immune from attack.” See Michigan Order ¶ 52. Unless the Commission strikes this evidence, it will tacitly encourage further “gaming” of the application process, since CLECs will have been rewarded for holding back evidence until the final round of comments. Id.

For instance, through the declaration of an employee, Intermedia presents new claims regarding implementation of its interconnection agreement with BellSouth during 1996. Declaration of Julia Strow on Behalf of Intermedia Communications Inc., attached to Reply Comments of Intermedia. Intermedia also introduces voluminous documents addressing events that occurred well before the deadline for initial comments in this proceeding and were discussed

in Intermedia's opening brief.⁴ Included in these attachments, for example, are correspondence from January of 1997 and data that, although seemingly assembled in November 1997, for the most part relates to periods before the October 20 comment deadline. Intermedia further presents the Commission with testimony from a hearing before the Florida Public Service Commission that predates the comment deadline.

KMC Telecom submits the affidavit of an independent consultant, Robert W. Walker, in support of its argument that BellSouth's offer to provide UNEs at a CLEC's collocation space is somehow discriminatory, Affidavit of Robert W. Walker, attached to Reply Comments of KMC Telecom Inc., while WorldCom offers new assertions about collocation arrangements and other interconnection issues through the affidavit of its employee David N. Porter. Affidavit of David N. Porter, attached to Reply Comments of WorldCom, Inc. There is no reason why these untimely factual assertions could not have been raised earlier in this proceeding, when they could have been reviewed and analyzed within the pleading cycle. They apparently have been presented at this late date precisely to avoid scrutiny and rebuttal.

Likewise, in its Reply Comments, Vanguard Cellular Systems for the first time references a May 1997 decision of the California Public Utilities Commission in an arbitration between Cook Telecom, Inc. and Pacific Bell, as supposed support for Vanguard's argument that BellSouth is not complying with its reciprocal compensation obligations. See Reply Comments of Vanguard Cellular Systems, Inc. at 6-7. Vanguard raised its argument in its opening

⁴ See Appendices A through K of Reply Comments of Intermedia. In addition to being untimely, most of these attachments violate the Commission's policy that all factual assertions be verified. See Revised Procedures at 3 (stating that factual assertions and expert testimony "submitted by any party must . . . be supported by an affidavit or verified statement of a person or persons with personal knowledge thereof"). This is an additional ground for striking them from the record.

Comments (Comments of Vanguard Cellular Systems, Inc. at 14-16), and its belated embrace of the California decision — which BellSouth has no opportunity to address — is improper.

ALTS offers new evidence that purportedly “clarifies” an assertion ALTS made in its opening brief. But this clarification is in reality a substitution: ALTS’s new affidavit offers totally different, contradictory facts to make-over demonstrably false claims about CLEC entry into the South Carolina local market. In its original comments, ALTS had presented an affidavit from an employee of ITC DeltaCom that contained a promise that ITC DeltaCom would someday compete for residential customers in South Carolina. In its Reply Comments, however, ALTS tries to show that, contrary to ALTS’ own prior assertion, it is not ITC DeltaCom, but “a separate entity, with whom DeltaCom has a business relationship, that will actually provide facilities-based local exchange residential service in South Carolina.” ALTS Reply Comments at 10. This new claim is directly at odds with the claims that ALTS had previously presented, which BellSouth has fully refuted. See BellSouth Reply at 13-16.⁵ ALTS’s claims are a moving target that cannot adequately be addressed by other parties or reviewed by the Commission. Michigan Order ¶ 52. ALTS may use its Reply Comments to respond to the assertions of other participants in this proceeding, but not to revamp its own claims.

For the reasons set out above, the listed portions of the following Reply Comments should be stricken:

⁵ Even if the Commission were to consider ALTS’s new argument and the confidential affidavit filed in support of it, the facts offered by ALTS lack the detail that would be necessary to support a showing of “reasonable steps” to enter the South Carolina market. The fact that the company at issue never appeared or was mentioned during the South Carolina PSC’s proceedings, and was not mentioned to this Commission prior to reply comments, casts further doubt on the accuracy of ALTS’s last-minute representations.

- ALTS — Pages 9 through 11 of Reply Comments, Affidavit of Stephen D. Moses, and Confidential Affidavit;
- Intermedia — Pages 9 through 15 of Reply Comments and Appendices A through K;
- KMC Telecom Inc. — Pages 6 through 8 of Reply Comments and Affidavit of Robert W. Walker;
- Vanguard Cellular Systems, Inc. — Pages 6 through 7 of Reply Comments;
- WorldCom, Inc. — Pages 3 through 13 of Reply Comments and Affidavit of David N. Porter.

2. New Arguments

These and other commenters have further abused their right to file reply comments by offering new, non-responsive legal arguments that are simply efforts to bolster positions the same parties previously took (and to which no party had yet replied). In making these supplemental arguments, CLECs ignore the Commission's explicit warnings that new arguments may not be raised in reply comments, nor may reply comments merely "repeat arguments made by that party in the application or initial comments." Revised Procedures at 7.

Some commenters seem to believe that any and all thoughts are appropriate, provided that they are labeled "reply" comments. For example, the Competition Policy Institute ("CPI"), which had never before made an appearance in this proceeding, cavalierly offered its untimely initial comments as "reply" comments. CPI offers no explanation as to why it failed to file timely initial comments. It certainly cannot be the case that CPI was unaware of this proceeding's deadlines; after all, CPI was created by, is funded by, and follows the policy guidance of AT&T, MCI, and the Telecommunications Resellers Association ("TRA") — all of

which appeared in this proceeding on the correct date.⁶ CPI's comments were 20 days late, and calling them "reply" comments does not change this fact. CPI's Reply Comments should be stricken in their entirety.

Like CPI, the National Cable Television Association ("NCTA") has offered, without explanation, its initial comments as "reply" comments. But unlike CPI, which filed its initial comments on the date that reply comments were due, NCTA, for some unknown reason, filed its comments after the deadline for initial comments but before the deadline for reply comments. These untimely initial comments also should be stricken in their entirety.

In its Reply Comments, AT&T offers a five-page argument regarding BellSouth's joint marketing plan, which is not a reply at all, but an expansion of the single paragraph AT&T offered on this topic in its initial comments. AT&T Reply Comments at 31-36. Pressed by the page limits for comments and ex parte submissions, AT&T appears to have deleted language from its comments, only to insert the passage into its Reply Comments. The purpose of reply comments is not to elaborate arguments made in initial comments, nor should reply comments function as a de facto waiver of the page limits the Commission has set for initial comments and ex parte submissions.

Hyperion Telecommunications and TRA likewise use their reply comments to supplement arguments made during the comment portion of this proceeding. In its Reply Comments Hyperion claims that BellSouth's application is "premature" because the SCPSC has not yet established "permanent" rates. Hyperion Reply Comments at 2-4. Hyperion does not

⁶ See Hearing Testimony of Ronald J. Binz, In the Matter of the Joint Application of Pacific Telesis Group and SBC Communications Inc., Application 96-04-038 (Cal. PUC Nov. 19, 1996), an excerpt of which is included in BellSouth's Appendix to its Reply Brief at Tab 11.

even bother to point to any comments to which this argument is a “reply,” nor did Hyperion raise this argument in its own initial comments.

Unlike Hyperion, TRA at least opens its new argument by pointing to comments that it allegedly addresses. TRA Reply Comments at 11. But after tipping its hat to commenters in the first clause of the first sentence of this multi-page argument, TRA never engages them, instead offering a new argument of its own regarding the rulings of the Eighth Circuit. TRA Reply Comments at 11-15. BellSouth should have the right to respond to TRA’s new argument.

The Reply Comments of Teleport most vividly reveal the charade of new arguments posing as reply comments. Teleport’s Reply Comments consist of two and one half pages, to which the company has attached a twenty-seven page “white paper” that details Teleport’s current views on what constitutes adequate ILEC reporting requirements. See Reply Comments of Teleport Communications, Exhibit 1. This white paper is not responsive to prior comments of any other party.

For the reasons set out above, the listed portions of the following Reply comments should be stricken:

- AT&T — Pages 31 through 36 of Reply Comments;
- CPI — Entire Reply Comments;
- Hyperion — Pages 2 through 4 of Reply Comments;
- NCTA — Entire Reply Comments;
- TRA — Pages 11 through 15 of Reply Comments;
- Teleport — Pages 2 through 3 of Reply Comments and attached “white paper.”

3. Improper Incorporation of Documents Filed in Other Proceedings

NCTA and Teleport have improperly offered substantive arguments in documents attached to their comments. NCTA has attached reply comments that they filed with the Commission in another proceeding, and Teleport has attached its white paper on performance measurements. The Commission has expressly ordered that commenting parties “make all substantive legal and policy arguments in [their] legal brief” and emphasized that it has the power “to strike, or to decline to consider, substantive arguments that appear only in affidavits or other supporting documentation.” Revised Procedures at 3. The Commission has further emphasized it is inappropriate to incorporate into reply comments “entire documents or significant portions of documents that were filed in other proceedings.” Id. at 7. The Commission should strike the documents that NCTA and Teleport have attached to their Reply Comments.

CONCLUSION

The improper replies listed above should be stricken from the record. Given the late date in this proceeding and the need to establish a proper precedent for future section 271 proceedings, such unequivocal action would best promote fairness and sound administration of the 1996 Act. In the alternative, and at a bare minimum, however, BellSouth should be granted


leave to file supplemental reply comments addressing these submissions and the Commission should explicitly rule that in future section 271 proceedings Bell companies will have the same right to answer improper filings. This alternative relief would have to be granted immediately, so that the Commission will have sufficient time to consider BellSouth's supplemental reply.

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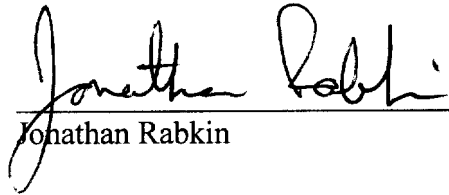
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 1997, I caused copies of Bellsouth's Motion to Strike Portions of Reply Comments Raising New Arguments and/or Including New Evidence to be served by facsimile and hand-delivery upon the parties whose filings are the subject of this motion (marked with an asterisk), and by U.S. mail on the remaining parties.


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